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ALEXANDER L. STEVAS,
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NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the police, after having illegally denied counsel access to the accused, who is being held in police custody, may thereafter obtain a valid waiver of counsel from the accused without advising him of his attorney's aborted attempt to meet with him.

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Respondent, Dan W. Smith, respectfully prays that certiorari to review the judgment and opinion of the Supreme Court of Illinois in People v. Smith, ___ Ill.2d ___, 442 N.E.2d 1325 (1982) be denied.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is complete and adequate in most respects. Additional facts not stated by petitioner are set forth in respondent's Reasons for Denying the Writ.

REASONS FOR DENYING THE WRIT

THE HOLDING OF THE ILLINOIS SUPREME COURT, THAT NO VALID WAIVER OF COUNSEL CAN BE PROCURED FROM AN ACCUSED WHOSE ATTORNEY HAS BEEN DENIED ACCESSS BY THE POLICE UNLESS THE POLICE, IN ADDITION TO MIRANDA WARNINGS, ADVISE THE ACCUSED OF THEIR INTERFERENCE WITH COUNSEL, IS CORRECT AND SHOULD STAND.

In the present case, the Illinois Supreme Court adopted a rule designed to effectuate the respondent's Fifth Amendment privilege against self-incrimination. Although the rule adopted by the Court is consistent with the decisions of every other State court addressing the identical factual situation and with the precedents of this Court, the State contends that such a rule is not constitutionally mandated. For the reasons set forth below, the State's contention should be summarily rejected and

its petition for a writ of certiorari denied.

In the course of reaching its decision, the Illinois Supreme Court adopted several findings of fact, some of which are disputed by the State. This Court is not, however, an appropriate forum in which to relitigate factual questions which have been decided adversely to the petitioner. Thus, the facts of this case, as found by the Illinois Supreme Court, disclose the following:

At 3:00 p.m. on September 2, 1978, Carol Ellerby, a partner of the law firm representing the respondent, Dan Smith, arrived at the Ogle County Jail to speak to Dan and his codefendant, Mary Smith. Ellerby was denied permission to see the respondent by the jailer, who informed her that the respondent was undergoing heroin withdrawal and was shaking so hard he could not stay on the bed. Ellerby left without having an opportunity to consult with the respondent.

In the afternoon of September 3, 1978, the police commenced an interrogation of the respondent, obtaining a tape recorded statement from him at that time and an additional statement the following day. At no time prior to obtaining these statements did the police tell the respondent that his attorney had been present at the jail seeking to consult with him and had been turned away.[1] In addition, although the supposed justification for turning Ellerby away was the respondent's heroin withdrawal, the police denied that the respondent had in fact been undergoing withdrawal symptoms, either at the time of Ellerby's visit or at the time of their interrogation of him; the trial court found these disclaimers regarding the defendant's heroin withdrawal to be true. No valid reason was ever given for the jailer's refusal

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1 The respondent finds the State's dispute as to the accuracy of the Supreme Court's finding on this point (State's petition at p. 14, f.n. 4) puzzling. Since the police denied that Ellerby had ever asked to see the respondent on the afternoon of the 2nd or that they had refused to allow her access to him, it is difficult to understand why they would nevertheless advise the respondent that his attorney had been turned away. Surely the State is not suggesting that, had it known the Illinois Supreme Court would adopt the instant rule, the police would have changed their testimony to conform to the rule, admitting that they did in fact deny counsel access to the respondent but that they had so informed the respondent.

to grant attorney Ellerby access to the respondent.

The Illinois Supreme Court was thus confronted with the following issue: Can an accused knowingly and intelligently waive his right to counsel when the police have illegally denied his attorney access to him and then withheld from him the fact of their interference with counsel? The Court determined that, under these circumstances, no effective waiver was possible. Specifically, the Court ruled as follows:

> We hold that when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him. People v. Smith, ___ Ill.2d ___, 442 N.E.2d 1325, 1329 (1982).

The holding announced by the Illinois Supreme Court is a logical and appropriate extension of the principles enunciated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966).

In Miranda, this Court held that no statement taken from the accused during custodial interrogation is admissible at trial unless the State establishes that certain procedural safeguards, designed to secure the accused's privilege against self-incrimination, are followed. These safeguards require the giving of the following warnings: 1) that the accused has the right to remain silent; 2) that anything he says can be used against him in a court of law; 3) that he has the right to the presence of an attorney prior to and during interrogation; and 4) that if he cannot afford an attorney, one will be appointed for him. 384 U.S. at 444, 479.

The Miranda Court noted that the right to have counsel present prior to or during custodial interrogation is indispensable to ensuring the full protection of an accused's privilege against self-incrimination. In this regard, the Court commented:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." [cite omitted] 384 U.S. at 466.

It is the very nature and setting of the custodial interrogation process -- its focus on privacy, secrecy, and isolation of the suspect as the most effective tools of interrogation -- which provided the doctrinal underpinnings for this Court's adoption of the procedural safeguards of Miranda. See 384 U.S. at 448-459. Yet the police were able to accomplish the very same objectives in this case, despite the giving of Miranda warnings, through the simple expedient of turning away the attorney who appeared at the jail to consult with and assist the respondent.

The State's contention that the rule adopted by the Illinois Supreme Court effectively allows a third party to invoke a suspect's Fifth Amendment privilege for him (State's petition at pp. 20-21) is thus entirely misfocused. By virtue of the very fact that the accused is in custody, his ability to consult with counsel, and likewise counsel's ability to consult with him, is limited to that access which is granted by the police. Allowing such consultations to take place only at the largesse of the police, and additionally allowing the police the discretion to determine whether they will even advise an accused of counsel's attempt to meet with him, defeats all the underlying principles of the Miranda decision and does, indeed, allow a confession to be obtained "at the unsupervised pleasure of the police."

Both logic and legal precedent bear out the validity of the Illinois Supreme Court's reasoning. The burden of establishing a knowing and intelligent waiver by the accused of his Fifth Amendment rights lies on the State. Miranda v. Arizona, 384 U.S. at 475. To meet this burden, it is not sufficient to establish that the defendant's statement to the police was voluntary. Rather, the State must demonstrate a knowing and intelligent relinquishment or abandonment by the accused of a known right or privilege. Edwards v. Arizona, 451 U.S. 477 (1981). Absent notice to an accused that his attorney has been unlawfully kept from him by the police, it is inconceivable that his waiver of his right to consult with counsel prior to interrogation can be deemed knowing and intelligent.

Under virtually identical factual circumstances, other

jurisdictions have interpreted the Fifth Amendment and this Court's Miranda decision in a manner wholly consistent with the Illinois Supreme Court. See Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969), Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977), State v. Haynes, 288 Or.59, 602 P.2d 272 (1979), cert. den. 446 U.S. 945 (1980), and Weber v. State, ___ Del.___, ___ A.2d ___, 32 CrL 2443 (1983). In each case, the courts have ruled that no knowing and intelligent waiver of the accused's right to counsel is possible, despite the giving of Miranda warnings, where the police have purposefully denied counsel access to the accused or otherwise deceived counsel as to his client's whereabouts, and have then failed to advise the accused of their interference with counsel.

The obvious rationale for the adoption of such a rule is not, as the State posits (State's petition at p. 17), to "inspire the suspect's confidence in his dealings with the police..." (One wonders, indeed, how the accused's knowledge that he has been isolated from his attorney would inspire any confidence in the police.) Rather, its purpose is two-fold: 1) to grant to the accused a renewed opportunity to obtain the consultation which was earlier frustrated by the police; and 2) to deny to the police the fruits of their misconduct absent evidence that they have attempted to rectify the situation.

Some jurisdictions have gone beyond the limited protective rule adopted by the foregoing jurisdictions, holding that the police, before obtaining a valid waiver of rights from an accused, must advise him if his attorney telephoned and requested that the accused not be interrogated in the attorney's absence. State v. Jackson, 303 So.2d 734 (La., 1974), State v. Jones, 19 Wash.App. 850, 578 P.2d 71 (1978).[2] It is only this latter situation, a situation not presented here, in which a contrary view has been expressed.

Thus, in State v. Burbine, 451 A.2d 22 (R.I., 1982), relied upon by the State in its petition, an attorney named Allegra

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2 Although the respondent would submit that this rule is also logically consistent with the underpinnings of the Miranda decision, the validity of such a rule is not placed in issue by the facts of the present case.

Munson phoned the jail where the defendant was being held and advised the police that she would act as the defendant's attorney in the event that the police planned to interrogate him or place him in a line-up; at no point did the attorney present herself at the jail to consult with the defendant. The Rhode Island court ruled that the defendant had validly waived his Fifth Amendment rights even though he had not been advised of the telephone call.

In addition to the fact that the attorney's involvement with the defendant's case was limited to a telephone call, other distinguishing features of Burbine are apparent: 1) The court found that at the time of attorney Munson's phone call to the police station, no attorney-client relationship existed between Munson and the defendant;[3] 2) The court credited the lower court's finding that there was no collusion or conspiracy on the part of the police department to secrete the defendant from the attorney; and 3) The court was concerned that its adoption of the rule sought by the defendant would encourage a floodgate of letters and phone calls to the police from attorneys representing recidivist clients asking that their clients, if arrested, not be interrogated in their absence, thereby creating an administrative nightmare.

Unlike in Burbine, the police facing a situation such as the one they have created in the case at bar face no insurmountable administrative obstacles in applying the Illinois Supreme Court's rule. The rule applies only to a suspect, already held in custody, whose attorney is denied a face-to-face consultation with him. Also unlike Burbine, since the police in the instant case provided no legitimate justification for their refusal to allow the respondent's attorney access to him, their behavior can only be interpreted as a calculated plan to isolate the

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3 Despite the State's contrary contention (State's petition at page 21), that the absence of an attorney-client relationship was a significant factor in the court's decision is apparent from its citation of State v. Fuentes, 433 A.2d 184 (R.I., 1981), a case involving a situation similar to Burbine which was resolved against the defendant due to the absence of an attorney-client relationship. Ohio has also found this factor to be significant in determining the duty of the police to advise an accused of an attorney's attempt to see him. See State v. Chase, 55 Ohio St.2d 237, 378 N.E.2d 1064 (1978).

respondent from counsel until a statement could be obtained.[4]

Miranda prescribes the minimum information which an accused must be accorded in order for the police to secure a knowing and intelligent waiver of his rights. However, it does not purport to, nor can it, cover every conceivable circumstance in which a defendant's Fifth Amendment rights are implicated. See Miranda v. Arizona, 384 U.S. at 444, 467, 478-479, Edwards v. Arizona, 451 U.S. at 487 (Burger, J. concurring). Thus, this Court has recognized that there are circumstances under which a defendant's statement may be deemed inadmissible under the Fifth Amendment notwithstanding the giving of full Miranda warnings. See Edwards v. Arizona, 451 U.S. 477 (1981), Michigan v. Mosley, 423 U.S. 96 (1975) and Sims v. Georgia, 389 U.S. 404 (1967). Illinois courts have likewise adhered to this principle. People v. Koesterer, 44 Ill.App.3d 468, 358 N.E.2d 295 (1976), People v. Ruegger, 32 Ill.App.3d 765, 336 N.E.2d 50 (1975). This case presents just such a situation in which Miranda warnings alone are not sufficient to ensure a knowing and intelligent waiver by the accused of his rights.

Moreover, irrespective of the correctness of the Illinois Supreme Court's ruling with regard to the defendant's Fifth Amendment privilege against self-incrimination, it is apparent that the respondent's Sixth Amendment right to counsel has been violated. As the State conceded in both the Illinois Appellate and Supreme Courts, the respondent's Sixth Amendment right to counsel had attached at the time of the police interference with his attorney. As the State also acknowledges, the State bears a heavier burden of establishing a knowing and intelligent waiver of counsel under the Sixth Amendment than under the Fifth Amendment. United States v. Satterfield, 558 F.2d 655 (2d Cir.,

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4 Surely, allowing the respondent's codefendant, Mary Smith, to be present prior to the interrogation of the respondent could have only enhanced this purpose, even though the State views her presence as evidence of the good faith of the police. It should be noted that by the time the interrogation of the respondent had commenced, not only had Mary given a full statement to the police singling out the respondent as the individual responsible for the planning and execution of the offenses, but she had also retained separate counsel, presumably in anticipation of severing her case from the respondent's. Her interests at that point in time obviously did not coincide with the interests of the respondent.

1976), United States v. Springer, 460 F.2d 1344 (7th Cir., 1972). Absent notice to the respondent of the police interference with his attorney, notice to counsel of the intended interrogation of the respondent, and the opportunity for a consultation between the respondent and counsel which had been earlier frustrated, no knowing and intelligent waiver of the respondent's Sixth Amendment right to counsel can be found. Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), United States v. Henry, 447 U.S. 264 (1980), Estelle v. Smith, 451 U.S. 454 (1981).

The rule the State is seeking in this case, then, is that the police may, with impunity, deny access to counsel retained or appointed to assist a suspect, for whatever reason the police deem appropriate. As long as the defendant himself does not request counsel, his own attorney can be kept from him at the whim of the police, and the police may obtain a knowing and intelligent waiver of the suspect's right to counsel without advising him of their interference with counsel's access to him. Such a rule is not only wholly inconsistent with the very underpinnings of this Court's decision in Miranda v. Arizona, but offends notions of fairness and justice as well. The Illinois Supreme Court ruled correctly in holding the respondent's statements inadmissible under the Fifth Amendment, and no further review of that Court's decision is warranted.

CONCLUSION

For the foregoing reasons, the respondent, Dan W. Smith, respectfully requests that the petitioner's petition for a writ of certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

G. Joseph Weller, Deputy Defender
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Josette Skelnik
Assistant Defender
Of Counsel

Date: 4/20

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STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

NOTICE AND PROOF OF SERVICE

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YOU ARE HEREBY NOTIFIED THAT ON April , 1983 we mailed the original and nine copies of a Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari along with Notice and Proof of Service to the Clerk of the above Court, copies of which are hereby served upon you.

G. Joseph Weller

G. Joseph Weller, Deputy Defender

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

The undersigned being first duly sworn on oath, deposes and says that he mailed the required number of copies of the Petitioner's Reply Memorandum, in the above-entitled cause to the Clerk of the above Court, the Attorney General of Illinois and the State's Attorney of Ogle County, by depositing them in the U.S. Mail in Elgin, Illinois, postage prepaid, this day of April, 1983.

G. Joseph Weller

G. Joseph Weller, Deputy Defender

SUBSCRIBED and SWORN to
before me this 11th day
of April, 1983.

Joan Mayer

Notary Public

NO. 82-1259

IN THE

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OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner

-vs-

DAN W. SMITH, Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, Dan. W. Smith, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Illinois, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Respondent was found to be indigent for purposes of appeal by the State of Illinois, and was represented by appointed counsel in the Illinois Appellate and Supreme Courts.

The petitioner's affidavit in support of this motion is attached hereto.

G. Joseph Weller, Deputy Defender

OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

TO PROCEED IN FORMA PAUPERIS

I, Dan W. Smith, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on my response to the petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of the proceeding are true.

1. Are you presently employed?

NO

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NO

3. Do you own any cash or checking or savings account?

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

6. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Dan Smith
Dan W. Smith

SUBSCRIBED AND SWORN to before me this 5th day of April, 1983.

Mary E. Gustavson
NOTARY PUBLIC